STATE OF MICHIGAN
IN THE SUPREME COURT

KENNETH J. SPEICHER,
Plaintiff/Appellee,

vs.

COLUMBIA TOWNSHIP BOARD OF TRUSTEES and COLUMBIA TOWNSHIP PLANNING COMMISSION,
Defendants/Appellants
_____/

Supreme Court Case No. 148617
Court of Appeals Case No. 306684
Circuit Court Case No. 11-600857-CZ

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STATEMENT OF INTEREST

Outside Legal Counsel PLC ("OLC") is a Michigan law firm with a substantial portion of its practice dedicated to private prosecutions of violations of the *Open Meetings Act* throughout Michigan on behalf of its clients. See Outside Legal Counsel PLC, http://www.olcplc.com/public/oma; see also *Michigan Freedom of Information Project*, http://www.olcplc.com/public/mifoip/oma. Attorney Philip L. Ellison is the managing member and a legal practitioner at Outside Legal Counsel PLC.

Amici has or are currently representing several local citizens, government officials, and others who are seeking, by judicial action, to have their local public body—whether a state, county, or local government—comply with the relatively simple requirements of the *Open Meetings Act* ("OMA"). All too often, local governmental actors ignore or are ignorant that the conduct of meetings and the political process demanding openness is controlled by state law. Because of the fee shifting provision of MCL 15.271(4), OLC can offer the ignored and minority voices of those abused by improper political process a remedy in the Circuit Court which would otherwise be denied by cost constraints. Amici offers this brief to share a few insights into the practical and real-life application of the *Open Meetings Act* and the difficulty in already obtaining any meaningful relief under the law, even with the reinterpretation of OMA proposed by Appellants.

STATEMENT OF QUESTION PRESENTED

I. Whether MCL 15.271(4) authorizes an award of attorney fees and costs to a plaintiff who obtains declaratory relief regarding claimed violations of the Open Meetings Act (MCL 15.261 et seq), or whether the plaintiff must obtain injunctive relief as a necessary condition of recovering attorney fees and costs under MCL 15.271(4)?

Amici answers: Nearly thirty years of precedence and legislative acquiescence has consistently held that a plaintiff who obtains declaratory relief has "succeed[ed] in obtaining relief" and is entitled to an award of actual attorney fees and costs pursuant to MCL 15.271(4).

BRIEF STATEMENT OF FACTS

Amici assumes the facts recited by the Court of Appeals are substantially accurate.

> In March 2010, the Columbia Township Board of Trustees ("Board") established that the regular meetings for both the Board and the Columbia Township Planning Commission ("Commission") would take place every month. However, at an October 18, 2010, Commission meeting, the Commission discussed and decided to hold quarterly rather than monthly meetings beginning in 2011.
>
> MCL 15.265(3) of the OMA requires that changes to "the schedule of regular meetings of a public body be posted within 3 days after the meeting at which the change is made." However, it is clear from the record that defendants did not post notice of this change on or before October 21, 2011, i.e., within 3 days of the October 18, 2011, meeting at which the Commission changed its regular meeting schedule.

Speicher v Columbia Twp Bd of Trustees, unpublished decision of the Court of Appeals, issued Jan 22, 2013 (Docket No. 306684), slip op at 1 ("*Speicher I*"). Thus, it was clear that the *Speicher* Board and Commission were in violation of MCL 15.265(3). See *id.* However, the issue in the Court of Appeals on reconsideration and now before this Court is what remedy is available to Plaintiff for successfully prosecuting a violation of OMA as, essentially, a private attorney general. See *Speicher v Columbia Twp Bd of Trustees (On Reconsideration)*, 303 Mich App 475; 843 NW2d 770 (2013)("*Speicher II*").

Initially, the Court of Appeals held that Plaintiff was "not entitled to any attorney fees or costs under MCL 15.271(4) on remand." *Speicher I, supra*, slip op at 2. However, after reconsidering the same, the Court of Appeals panel held—

> Because we concluded that plaintiff was entitled to declaratory relief, by virtue of a long line of cases issued by this Court—*Craig v Detroit Pub Sch Chief Executive Officer*, 265 Mich App 572; 697 NW2d 529 (2005), *Herald Co, Inc v Tax Tribunal*, 258 Mich App 78; 669 NW2d 862 (2003), *Morrison v East Lansing*, 255 Mich App 505; 660 NW2d 395 (2003), *Nicholas v Meridian Charter Twp Bd*, 239 Mich App 525; 609 NW2d 574 (2000), *Manning v East Tawas*, 234 Mich App

244; 593 NW2d 649 (1999), and *Schmiedicke v Clare Sch Bd*, 228 Mich App 259; 577 NW2d 706 (1998)—he is also entitled to attorney fees.

Speicher II, supra, at 476. The panel disagreed with this thirty years of precedence and called for a conflict panel pursuant to MCR 7.215(J)(3). The request was denied by the full body of judges at the Michigan Court of Appeals. *Speicher v Columbia Twp Bd of Trustees*, unpublished full court panel order of the Court of Appeals, issued Jan 14, 2014 (Docket No. 306684). This Court, by an order dated June 11, 2014, has now considered Defendants' application for leave and directed the Clerk of the Supreme Court to schedule oral argument on whether to grant the application or take other action. *Speicher v Columbia Twp Bd of Trustees*, __ Mich __; 846 NW2d 923 (2014). Amici files this brief to offer competing considerations to this Court overturning established black letter law and applying the same in the area of governmental transparency.

MEMORANDUM OF LAW

This appeal focuses solely on the interpretation of a few words in a single sentence of a 'sunshine' statute:

> If a public body is not complying with this act, and a person commences a civil action against the public body for injunctive relief to compel compliance or to enjoin further noncompliance with the act and succeeds in obtaining relief in the action, the person shall recover court costs and actual attorney fees for the action.

MCL 15.271(4). As the Court of Appeals correctly noted, a long unbroken line of cases have held that declaratory relief constitutes as "succeed[ing] in obtaining relief in the action" and an award of attorney fees and costs is required. See e.g. *Nicholas v Meridian Charter Twp Bd*, 239 Mich App 525; 609 NW2d 574 (2000).

ARGUMENT

I. The plain language of MCL 15.271(4) does not require the issuance of an injunction as a condition to being entitled to attorney fees.

This Court should deny leave in this case because the nearly thirty years of precedence correctly interpreted MCL 15.271(4). Had the Legislature intended to require an injunction as a precondition to recovery of attorney fees and costs *after* a public body was found in actual violation of OMA, it would have plainly said so. *Nicholas*, an *Open Meetings Act* case, provides the concise rules of statutory interpretation—

> The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature.... The first criterion in determining intent is the specific language of the statute.... The Legislature is presumed to have intended the meaning it plainly expressed.... Where the language of a statute is clear and unambiguous, judicial construction is generally neither necessary nor permitted.... Courts may not speculate concerning the probable intent of the Legislature beyond the words expressed in the statute.

Nicholas, *supra*, at 530.

Here, the Legislature only requires that plaintiff "succeeds in obtaining relief in the action." MCL 15.271(4). The Legislature did not say "succeeds in obtaining '*injunctive*' relief" or "succeeds in obtaining '*all*' relief." A narrowing reading of the statute would run contrary to the requirement that OMA be interpreted "broadly." *House Speaker v Governor*, 195 Mich App 376, 395; 491 NW2d 832 (1992). Requiring 'injunctive relief' rather than 'relief' would be the Court adding words to a statute which simply are not there. This Court has reiterated often and clearly that the courts of this state may read nothing into an unambiguous statute. See, e.g., *Halloran v Bhan*, 470 Mich 572, 577; 683 NW2d 129 (2004); *Neal v Wilkes*, 470 Mich 661, 670 fn 13; 685 NW2d 648 (2004) ("Plaintiff . . . is adding words to the act that simply are not there.");

State Farm Fire & Cas Co v Old Republic Ins Co, 466 Mich 142, 146; 644 NW2d 715 (2002) (judiciary's role includes interpreting statutes, not writing them). "If the statute is unambiguous on its face, the Legislature will be presumed to have intended the meaning expressed, and judicial construction is neither required nor permissible." *Lorencz v Ford Motor Co*, 439 Mich 370, 376; 483 NW2d 844 (1992).

If there is any question as to whether the Legislature intended the result, the doctrine of legislative acquiescence confirms such a reading. While the doctrine of legislative acquiescence "is a highly disfavored doctrine of statutory construction," *McCahan v Brennan*, 492 Mich 730, 749; 822 NW2d 747 (2012), the unique fact that OMA applies both to local governmental bodies and to the Legislature as whole confirms that MCL 15.271(4) has not been interpreted in a way contrary to the Legislature's intent. MCL 15.262(a); see also MCL 15.265(5) ("If either house of the state legislature is adjourned or recessed for less than 18 hours, the notice provisions of subsection (4) are not applicable."). Had it been so and given the direct effect on the procedures of the Legislature itself, the Legislature would have amended the same. Despite at least fifteen amendments to OMA since its enactment,[1] the Legislature has left, unaltered, the principle that a declaration of a violation of OMA by a court via a civil action commenced under Section 11 of OMA requires the violating public body to reimburse actual attorney fees and costs for violating statutory principles of good governance.

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[1] 1978 PA 256; 1981 PA 161; 1982 PA 130; 1982 PA 134; 1984 PA 87; 1984 PA 167; 1984 PA 202; 1986 PA 269; 1988 PA 158; 1988 PA 278; 1993 PA 81; 1996 PA 464; 2001 PA 38; 2004 PA 305; 2012 PA 528

II. Good public policy follows the plain reading of MCL 15.271(4).

OMA was created to insure an open and accountable government. *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 192 Mich App 574, 580; 481 NW2d 778 (1992), rev'd in part on other grounds, 444 Mich 211 (1993). "[T]he purpose of the OMA is to promote governmental accountability by facilitating public access to official decision making and to provide a means through which the general public may better understand issues and decisions of public concern." *Kitchen v Ferndale City Council*, 253 Mich App 115, 125; 654 NW2d 918 (2002). Because the original act initially failed to provide for an enforcement mechanism or penalties for noncompliance, the modern OMA was enacted in 1976 to remedy the oversight and "promote a new era in governmental accountability." *Booth v Univ of Michigan Bd of Regents*, 444 Mich 211, 222; 507 NW2d 422 (1993). One of these newly enacted enforcement provisions was MCL 15.271(4), which provided that a successful plaintiff could recover court costs and actual attorney fees. As legal counsel to those who seek corrective remedies for violations of OMA in courts throughout the state to compel compliance, Amici's experience is that courts are consistently reluctant to enjoin a public body or its officials from future violations of OMA. It rarely happens. This rarely happens because the issuance of an injunction is discretionary. *Wayne County Retirement Sys v Wayne County*, 301 Mich App 1, 25; 836 NW2d 279 (2013). This Court must be mindful that local circuit court judges are elected officials and often seek or need the support of local political leaders to be elected to judicial office. While Amici's experience is that courts are capable and willing to make declarations of violations of OMA, rarely is an injunction issued. This is likely because additional violations by the local government official would require sanctions via contempt, rather than merely a simple declaratory judgment. The

likelihood for 'political discomfort' is high if a local circuit court judge has to hold another local political leader in contempt—a civil crime—and then later need his or her (and his or her supporters) political backing to be reelected. Instead, and frequently, trial court judges simply issue a declaratory judgment with a stern warning. The real remedy, as provided by the Legislature, is that a private citizen should not be out-of-pocket a single dime for successful public prosecutions of a public body's violations of OMA by an award of "actual" attorney fees—a legislative rarity in Michigan law. However, if this Court were to reinterpret the thirty years of precedence of MCL 15.271(4) to require an injunction as a precondition to *any*[2] attorney fees when combined with local judicial reluctance to issue an injunction, the private enforcement of OMA will be limited only to those who can afford the substantial costs of litigation, placing out of legal reach the practical ability of the local members of the community to keep village, township, city, and county governmental bodies open and accountable.

OMA's legislative purpose was "to promote a new era in governmental accountability" with a major component of enforcement the reimbursement of "actual" attorney fees to any person who "commences a civil action against the public body for injunctive relief to compel compliance or to enjoin further noncompliance with the act and succeeds in obtaining relief in the action." OMA has placed into the hands of those on the front line, those who directly observe violations of local legislative bodies, the legal and financial tool to act as a private attorney general to rectify violations which run contrary to open and accountable government. Legislators perceived that, by promoting *and enforcing* openness in governmental decision-making, OMA would cause

[2] The award of attorney fees under MCL 15.271(4) is either actual or none.

responsible decision making and minimize abuse of power. *Booth*, *supra*, at 223. This Court should deny leave on the application.

III. Alternatively, prospective application of any reinterpretation should be applied.

As the Court of Appeals correctly noted below, the lower court panel was bound to follow the previous decisions of the Court of Appeals. MCR 7.215(J)(1). Additionally, the panel correctly recounted that the interpretation of MCL 15.271(4) flows back to 1981 with the decision of *Ridenour v Dearborn Sch Dist Bd of Ed*, 111 Mich App 798; 314 NW2d 760 (1981). As such, numerous cases are pending throughout the state, including cases with litigants being represented by Amici, in reliance of issued law. The cases were initiated and pursued under a body of law established for more than thirty years. If this Court were to overturn this long-standing interpretation of MCL 15.271(4), Amici advocates that such application apply only prospectively, to future legal actions to be filed. A judicial decision can be applied with full retroactivity, with limited retroactivity, or prospectively. *Monat v State Farm Ins Co*, 469 Mich 679, 702; 677 NW2d 843 (2004) (Cavanagh, J., dissenting). This Court "often ha[s] limited the application of decisions which have overruled prior law or reconstrued statutes." *Hyde v Univ of Mich Bd of Regents*, 426 Mich 223, 240; 393 NW2d 847 (1986). This Court's decision in *Pohutski v City of Allen Park*, 465 Mich 675; 641 NW2d 219 (2002) counsels that prospective application is warranted if this Court adopts the suggestion of the lower court panel as a brand new rule of law. Prospective application is permitted and appropriate to decisions which overrule clear and uncontradicted case law. *Hyde, supra*, at 240. This is such a case to avoid fundamental unfairness and the hiring of counsel on terms which were based on this established precedence.

In *Pohutski*, this Court noted the previous adoption of a three-factor test to determine whether to apply prospective application to a new rule of law: (1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice. *Pohutski*, *supra*, at 696. All three factors weigh in favor of prospective effect of any reinterpretation of MCL 15.271(4). Cases around the state pending or decided (but on appeal) have relied on this interpretation in initiating and prosecuting OMA violation cases. If this Court were to find a misinterpretation of MCL 15.271(4) (contrary to the arguments of Amici, see *supra*) existing for more than three decades, prospective application would further this purpose in correcting that error. The first factor is fulfilled. As to the second factor, reliance on said rule when litigants entered the legal arena (and representation agreements) was set by approximately thirty years of an unbroken line of cases holding that issuance of declaratory relief fulfills the required element of "succeeds in obtaining relief" under MCL 15.271(4). The second factor is fulfilled. As for the third factor, the effect of retroactivity on the administration of justice, many legal agreements and contracts between plaintiffs and their counsel (like Amici) have been crafted by and negotiated under the guise of the thirty years of precedence. Changing the rule and having full retrospective effect will result in unanticipated legal costs to litigants and possible dire financial consequences to clients attorneys who may have taken and initiated OMA cases in light black letter interpretation of the fee shifting provision of MCL 15.271(4).[3]

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[3] Some OMA cases might have to be abandoned altogether because a litigant could only hire a particular attorney who was willing to assume the case in reliance of the decisions interpreting MCL 15.271(4) and now must seek to withdraw as counsel due to financial hardship, a permissible basis to withdraw. MRPC 1.16(b)(5).

CONCLUSION

Like all citizens of our state, governmental bodies must follow the law enacted by our Legislature. The *Open Meetings Act* is a simple enough law for public bodies to follow: provide appropriate notice of meetings to the public, deliberate and make decisions publicly (except as exempted), and create timely meeting minutes. Violations of OMA are usually not the result of an intentional act to violate OMA, but a likely attempt to hide deliberations or decisions which are politically inconvenient or undesirable to the electorate. Applying the plain reading of MCL 15.271(4) requires a public body to pay actual attorney fees and costs in a singular instance: when a public body is not complying with OMA, and a person commences a civil action against the public body for injunctive relief to compel compliance or to enjoin further noncompliance with the act and succeeds in obtaining relief in the action. The easiest way for public bodies to avoid this penalty is not to have this Court re-interpret the statute contrary to settled law, but rather reinforce public bodies to comply with the simple requirements of OMA.

RESPECTFULLY SUBMITTED:

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